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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket 87-154

<u>CONSOLIDATED COMMENTS OF AFLAC BROADCAST GROUP, INC.</u>

AFLAC BROADCAST GROUP, INC.

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SUMMARY

AFLAC Broadcast Group, Inc. ("AFLAC") hereby submits its Consolidated Comments in response to the Commission's Notices of Proposed Rule Making in the broadcast ownership and attribution proceedings. In considering these proposed changes, the Commission should act to preserve and enhance the twin pillars of localism and diversity upon which American broadcasting is based.

AFLAC submits that the Commission should retain the current 25% cap on television ownership. Any substantial increase in the national ownership limits for television would permit the networks to buy a larger percentage of their distribution chain and, in so doing, would significantly reduce the bargaining power of the non-owned network affiliates. This loss in the relative strength of the affiliated stations vis-a-vis the networks would seriously erode or eliminate the stations' right to preempt network programming and would significantly weaken the editorial discretion of the local stations.

The Commission also should revise its attribution rules in several respects. First, the Commission should eliminate the single majority shareholder exemption, which permits an entity to own up to a 49% interest in a broadcast station, without that interest being attributed to it, if there is a single majority shareholder. AFLAC believes that a minority shareholder

exercises considerable influence over a broadcast licensee even when there is a single majority shareholder. Moreover, it is likely that a minority shareholder with interests above the Commission's attribution benchmarks has other business interests or relationships with the licensee that permit it to influence the conduct of that licensee.

Second, AFLAC believes that the Commission should treat television LMAs as attributable interests and should require the filing of those agreements with the Commission or in the station public inspection file. At a minimum, LMAs involve programming and often involve, personnel, facilities, and financing, as well. The station or entity providing the programming plainly has the ability to influence the conduct of the licensee. Even though the extent of that influence may not rise to the level of _de facto_ control, the Commission should recognize the existence of that influence or potential influence by counting such agreements as attributable interests. A requirement that those agreements be filed with the Commission or be placed in the station's public inspection file will permit the general public and other stations to review the agreements and will aid them in bringing potential abuses or rule violations to the attention of the Commission.

Finally, AFLAC proposes that the Commission create a new flexible category of _de facto_ attribution to permit the attribution of interests in particular cases in which a party has the ability to exercise significant influence over the conduct of a broadcast licensee. This would be somewhat analogous to the concept of de facto control and would allow the Commission to rule on a case-by-case basis that a particular combination of factors should be treated as an attributable interest, even though individually, those factors might otherwise not be attributable.

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CONSOLIDATED COMMENTS OF AFLAC BROADCAST GROUP, INC.

AFLAC Broadcast Group, Inc. ("AFLAC")[1/], by its attorneys, hereby submits its Consolidated Comments in the above-referenced proceedings.[2/] For the reasons set forth below,

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[1/]AFLAC is a general partner of AFLAC Broadcast Partners. AFLAC also is the sole shareholder of WITN-TV, Inc. Through AFLAC Broadcast Partners and WITN-TV, Inc., AFLAC owns and operates the following network-affiliated television stations: WAFB(TV), Baton Rouge, Louisiana (CBS); WAFF(TV), Huntsville, Alabama (NBC); KWWL(TV), Waterloo, Iowa (NBC); WTVM(TV), Columbus, Georgia (ABC); KFVS-TV, Cape Girardeau, Missouri (CBS); WITN-TV, Washington, North Carolina; and WTOC-TV, Savannah, Georgia.

[2/]Because the nature of the issues raised in the two proceedings is so interconnected, AFLAC hereby requests leave to submit Consolidated Comments addressing the issues raised in these two proceedings, FCC 94-322, (released January 17, 1995) (the television ownership proceeding) and FCC 94-324 (released January 12, 1995) (the attribution proceeding).

AFLAC submits that the Commission should retain the current 25% cap on television ownership. The Commission also should revise its attribution rules to eliminate the single majority shareholder exemption, to treat television LMAs as attributable interests, and to create a new flexible category of de facto attribution to permit the attribution of interests in particular cases in which a party has the ability to exercise significant influence over the conduct of a broadcast licensee.

I. THE COMMISSION SHOULD RETAIN THE CURRENT 25% NATIONAL AUDIENCE CAP ON TELEVISION STATION OWNERSHIP.

The Commission has proposed to increase the current 25% audience cap on television station ownership to 50%. However, AFLAC believes that adoption of this proposal would be directly contrary to the public interest and to the interests of the viewing public. Although AFLAC does not oppose elimination of the current numerical limit on television stations, it believes that the 25% audience reach limit should not be increased.

The Commission's proposal to increase the national audience reach limits for television is fundamentally flawed because it fails to take into account the unique nature of broadcast television. The "new analytical framework" proposed by the Commission in its Further Notice of Proposed Rulemaking ("Further Notice") is based upon a traditional antitrust analysis, including an evaluation of product substitutability and market definition. See Further Notice at ¶¶ 15 - 53.

But AFLAC believes that the real issues here are not susceptible to such an economic analysis. Instead, the core issue is the preservation of the unique character and quality of American broadcasting. American broadcasting is a local service.[3/] Broadcasters serve as public trustees who are required by law to serve the interests of their local communities. The license renewal expectancy for incumbent broadcast licensees is reflective of that bedrock value and is based primarily upon programmatic and other service to their local communities. See Cowles Broadcasting, Inc., 86 FCC 2d 993 (1981), aff'd sub nom. Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983).

Although antitrust law is fundamentally an economic, numbers-based analysis, localism and diversity are imprecise, hard-to-define qualities that cannot readily be quantified. How would one measure, for example, the qualities that go into making a viewer interested in watching one program over another, that

[3/] See, e.g., 47 U.S.C. § 307(b). "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as provide a fair, efficient, and equitable distribution of radio service to each of the same."

make a particular on-air personality appealing when another is not, or that account for the many ways in which local stations relate to their viewers? The fact of the matter is that those things cannot be measured. For this reason, AFLAC believes that it would be a mistake to accept an antitrust approach, such as that as suggested by the Commission, as the starting point for evaluating the Commission's ownership limits. Instead, those limits should be analyzed in terms of the fundamental purposes of the American broadcasting system: to preserve and protect localism in broadcasting and to provide the American viewing public with a range of diverse points of view.[4]

Adoption of the Commission's proposal to substantially increase the national audience reach limits would undermine the localism and diversity that lie at the heart of American

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[4]Moreover, if the Commission moves to a strict antitrust perspective with respect to its national and local ownership limits, there is very little reason to keep that function at the Commission. The Department of Justice and the Federal Trade Commission, as the Commission has recognized in other contexts, are far more expert than the Commission in enforcing antitrust laws. Thus, if localism and diversity are no longer important values which merit Commission protection, there appears to be no need to have the FCC duplicate the antitrust enforcement efforts of the Antitrust Division at the Justice Department. In addition, those same values of diversity and localism underlie many of the other rules and policies of the Commission -- such as its policies concerning Equal Employment Opportunity. If, contrary to AFLAC's opinion, the Commission determines that they are no longer important, we suggest that the Commission should reexamine some of its other functions, such as in the area of EEO enforcement, for instance, to determine whether functions that it now is performing are not simply duplicating activities that are more efficiently performed by other agencies such as the Department of Justice and the EEOC.

broadcasting by concentrating control of programming in the hands of a few large national companies, primarily the existing national television networks.

This would occur because a substantial change in the current national ownership limits, as proposed by the Commission, would dramatically alter the present balance of power between the networks and their affiliated stations. That balance of power is based upon the fact that, because the current ownership limits effectively prevent the networks from owning their station outlets in all but a small percentage of the largest markets, the networks must negotiate for contractual relationships with stations in the remaining markets in order to secure nationwide distribution of their programming. Although network affiliation agreements ultimately are a matter of negotiation between an individual network and a single station, many of the overarching issues between networks and their affiliated stations are handled by preliminary negotiations between networks and various factions of their affiliates. These factions do not remain constant but change from issue to issue -- witness this proceeding and the broadcast ownership legislation now being considered in Congress.

For example, in the current round of affiliation negotiations between NBC and its affiliated stations (which now are being conducted on an individual station level), the initial negotiations took place between NBC and the board of its station affiliate group. These negotiations resulted in a model agreement which, in turn, served as the beginning point of negotiations between individual stations and the network.

One of the most important and contentious issues in those negotiations -- and one with significant public interest implications -- was the issue of an individual station's right to preempt network programming. Not surprisingly, this is a matter of continuing contention between the networks and their affiliated stations. The networks want their affiliates to carry or "clear" 100% of the programming broadcast by the networks, as scheduled. In this way, the network simplifies its relationships with advertisers and program producers and maximizes its own profitability by gaining access simultaneously to the largest number of markets and potential viewers. The individual stations, on the other hand, have an interest in preserving the freedom to preempt or reject network programming in order to carry news, public affairs, or other programming of interest to their local communities (like high school football scores on Friday nights in the Fall, which interfere with the scheduling of Letterman, Leno, or Nightline) -- or because, in the station's view, the tone or quality of the network programming -- or its appeal to the station's service area, as measured by the program's ratings -- is not satisfactory.

AFLAC submits that the public interest, and the interests of the local viewing public, require that the right and ability of an individual station to reject network programming be protected and preserved. Without that, network affiliated stations will lose the editorial discretion which they now possess and will be forced to carry whatever programming they are sent by the networks. This would effectively replace a local station's editorial judgment about what is best for its community with the "one size fits all, cookie cutter" programming decisions of the networks reached in New York or Hollywood. Moreover, because these programming decisions would be concentrated in just a few hands, without the meaningful influence of local stations across the United States, the present wide diversity of programming could be expected to be diminished significantly.

The potential loss of the current bargaining strength of network affiliates is very much at issue here. If the national ownership limits are raised to the degree contemplated by the Commission's Further Notice, networks will be able to own much more of their national distribution chains than at the present time. If, for example, the national audience cap were raised to 50%, networks and other large broadcast groups would be able to own everyone of their affiliated stations in the top 25 television markets. Network ownership of their affiliates in those markets would eliminate those as a factor in the network/affiliate negotiations. The result would be a significant weakening of the bargaining position of the remaining non-owned affiliates in the network-affiliate negotiations.

These stations would, by definition, be located in the smaller, less important market. Without the bargaining clout of stations in the larger markets -- which now would be largely owned or controlled by the networks -- these stations would not have much real leverage in the network/affiliate negotiations. The networks could be expected to use their increase in negotiating power to insist on provisions that are important them -- such as affiliate clearance of all (or virtually all) network originated programming.

The recent negotiations between NBC and the NBC Affiliates Board concerning the model NBC affiliation agreement support this conclusion. Even the model agreement that was produced after those negotiations contained significant proposed restrictions on the ability of stations to preempt network programming. Thus, the model agreement provides that stations may not preempt network programming except for "breaking news stories." The agreement also precludes stations from preempting network programming based on ratings, audience reaction, or the availability of other programming which the station believes would be more profitable.

The agreement further provides that if a station preempts the network more than a limited number of hours per year, it not only loses network compensation for the programs which it did not broadcast but must compensate the network for the station's share of any revenue lost by the network as a consequence of the station's preemption decision. Thus, even though the network and the affiliated stations as a whole are now relatively balanced in negotiating power, the model agreement seeks to significantly restrict an affiliated station's ability to preempt network programming.

Thus, even now, network affiliates faces continuing attacks on the exercise of their independent editorial judgment. Imagine what the situation will be if the networks are permitted to purchase their affiliates in the top 25 markets -- which is what a 50% audience reach limit would permit. In that case, the networks' power to dictate terms to the remaining non-owned affiliates on issues such a network preemption would be virtually overwhelming.

It is not safe to assume that the Commission's rules will continue to protect a station's right to reject network programming, notwithstanding this significant change in the bargaining positions of the networks versus the affiliated stations. Even now, the Commission is taking no action on affiliate agreements which, by contract seek to eliminate a station's right to reject network programming. Moreover, the Commission already has begun a piece-by-piece reconsideration of its network rules which, AFLAC understands, has as its ultimate, although not yet formally articulated, goal the removal of most, if not all of the Commission's current broadcast network rules.

Specifically, AFLAC understands that this series of related proceedings will include a review of the current FCC rule which protects an affiliate's right to reject network programming. Although AFLAC intends to oppose this proposal (as well as the Commission's proposal to eliminate the requirement for filing network agreements with the Commission), in the context of this proceeding, it becomes more important than ever to do everything possible to preserve the present parity between networks and their affiliates.

This is not simply an abstract issue. It is one that will have a direct impact upon the type and quality of programming that is seen by the American viewing audience. One of the best and most effective checks upon potential abuses by the networks is the individual and collective power of the network affiliated stations. A few examples will serve to illustrate this point.

The interview between Connie Chung and Speaker Gingrich's mother that was broadcast last fall by CBS generated a flurry of public and largely negative comments about CBS's decision to air the whispered comments of Mrs. Gingrich. What is not so well known, however, is that the CBS affiliates, individually and collectively, were among the harshest critics and most pointed questioners of that decision. At a meeting between CBS and its affiliates, in Las Vegas in January of this year, affiliate after affiliate rose in an open meeting with the President of CBS News to express their disagreement about the decision to broadcast those comments.

Such internal criticism is far more effective than any outside oversight ever would or could be -- particularly when the First Amendment restrictions on government oversight are taken into account. The fact is that with the right to reject network programming now guaranteed both by FCC rule and by current network affiliation agreements, networks necessarily must take into account the opinions of their non-owned affiliates, or risk impairing the effectiveness of their nationwide distribution system.

In recent years, criticism from network affiliates has not only played an important role in preserving the integrity of the network news services (which is the primary source of national news for most Americans) but in preserving the availability and quality of free over-the-air entertainment programming, as well.

For example, during the last Olympics, NBC provided coverage of a broad range of events through cable pay-per-view. This was in addition to its broadcast over-the-air coverage. Without the input and objections from its non-owned affiliated stations, NBC probably would have placed much more of the Olympic events on its pay-per-view service, rather than offering them on over-the-air television. The clout which these stations had in their discussions with NBC about this subject came directly from their then largely unfettered right to reject NBC network programming. NBC was forced to listen to their concerns because of NBC's need to preserve the integrity of its distribution system by preventing widespread preemptions of NBC programming. Without that right to reject network programming, which they achieved by virtue of their collective and individual bargaining power, NBC would have had very little reason to listen to the concerns of the affiliates.

In that case, the affiliates willingness to speak up, and their ability to be heard by NBC, served not only the station's interests but the interests of America's viewing public as well -- it prevented NBC from siphoning the Olympics off of free over-the-air television, where is was accessible by rich or poor, to pay-per-view, where it would have been watched only by those able to afford to subscribe to cable service and to pay the additional charge for the Olympics as well.

The strength of the affiliates also will serve to prevent the inevitable attempts by the networks to generate another revenue stream -- cable subscriber fees -- by slowly transferring programming from free over-the-air television to cable services such as CNBC or ESPN. If permitted, such siphoning off of programming would inevitably result in broadcast television becoming a second class entertainment medium. The current strength and vitality of the network affiliates serves the public interest by preventing such degradation of our television broadcast system.

The important role of network affiliates also has been demonstrated in the discussions between ABC and many of its affiliates over the past few years with respect to their concerns about "NYPD Blue." When that program was first screened for affiliates, about half of the ABC affiliated stations expressed their deep concern about the content of the program and 60 or more stations, including AFLAC's station WTVM in Columbus, Georgia, refused to carry it because of concerns that the nudity and sexual explicitness of portions of the program would be inconsistent with the community values of their home markets.

Although WTVM, along with most other ABC affiliates, is now carrying the program, the frustration caused to ABC in dealing with this wholesale preemption got the attention of the network and could not help but have a deterrent effect with respect to future programming decisions. Thus, ABC and its program suppliers, as well as the other networks and their suppliers, now have been sensitized to some degree about these types of concerns and will be reluctant to air other such programming, at least not without substantial advance consultation with their respective affiliates.

In the event that the Commission's proposal is adopted, however, network affiliates in a similar situation in the future will be left largely without any real negotiating power. But with that power, the affiliates were able to effectively express and articulate concerns that reflected the perspectives of their individual communities of license and the viewing public. AFLAC submits that the continuing ability of the affiliates to effectively articulate concerns of their particular communities is critical to maintaining the viability of the American system of local broadcasting and its responsiveness to the interests of the viewing public.

In sum, AFLAC strongly opposes any significant increase in the current national ownership limits for television stations. Such a change would undermine the values of localism and diversity which are at the heart of the American broadcasting system.

II. THE COMMISSION SHOULD REVISE ITS OWNERSHIP ATTRIBUTION STANDARDS.

As the Commission has recognized in both of these proceedings, the issue of what type of noncontrolling interests are considered to be "attributable" has a direct impact on the effectiveness of the national and local ownership limits because the attribution rules define what type of interests are counted toward those limits. Thus, even if the existing ownership limits are not changed substantially, it may be possible to significantly extend the influence of a single individual or company far beyond the level contemplated by the multiple ownership rules through a variety of interests that are not defined as controlling or attributable.

AFLAC believes that such practices are an unintended consequence of the Commission's current attribution rules and that they are occurring on a broad scale. Accordingly, AFLAC believes that the Commission's current attribution rules need to be modified in several important respects in order to prevent such "end runs" around the Commission's multiple and local ownership restrictions.

A. THE COMMISSION SHOULD REVOKE THE SINGLE MAJORITY SHAREHOLDER EXEMPTION TO ITS ATTRIBUTION RULES.

One of the most important changes that the Commission should make in its current attribution standards is to eliminate the so-called "single majority shareholder exemption." Under this exemption, an entity or individual may own up to a 49% voting interest in a broadcast licensee without being attributed with that interest, so long as another entity or individual owns a majority of the voting stock. There are several serious problems with this exemption.

First, this exemption presumes that even in a "plain vanilla" shareholder arrangement, where there are no other relationships between the two parties, the 49% shareholder has **no significant influence over the conduct of the licensee.** AFLAC submits that this assumption is clearly in error. Many of the deals that are now being pursued by the networks, and others, are structured as 51/49% deals but are clearly intended to confer significant influence upon the minority shareholder.

For example, AFLAC has been approached by CBS with such a proposal and has had several meetings with CBS to explore it. The plan would be for AFLAC to hold a 51% interest in a company or joint venture in which CBS would have a 49% interest. That company would acquire additional stations which would become CBS affiliates. CBS could thereby extend its influence and reach while avoiding attribution of this interest because of the single shareholder exemption.

Accordingly, AFLAC believes that, even when there is a single majority shareholder, the minority interest should be analyzed and attributed as it would be in the absence of a single majority shareholder -- that is once the minority interest is above the Commission's attribution thresholds, whatever they may be, it should be considered an attributable interest. As the Commission itself stated in its Notice in the attribution proceeding: Our judgment as to what level of "influence" should be subject to restriction by the multiple ownership rules has, in turn been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions." Notice at ¶ 4. AFLAC believes that there is no question but that a minority shareholder has that potential.

The fact is, however, that in most cases which are structured to take advantage of the single majority shareholder exemption, it is not a "plain vanilla" stock deal. It is often a complex deal in which the stock ownership is only the "tip of the iceberg" of the various business and other relationships between the two parties. For example, in the recent acquisition of WLUK-TV in Green Bay, Wisconsin by Savoy Fox, Fox has a 25% nonvoting interest in the licensee; Savoy holds 100% of the voting stock. However, Fox also has: a 45% equity investment in the licensee; an option to increase its nonvoting stock to 50% and, at a later time to convert its nonvoting shares to voting stock; a former key employee who is President of the licensee and a member of its-three member board; another former employee in a key decision-making capacity at the licensee; a 10-year affiliation agreement with the station; and approval rights over certain major decisions of the licensee. BBC License Subsidiary L.P., FCC 95-179 (released April 27, 1995) (Separate Statement of Commissioner Susan Ness).

In that context, to say that Fox will not have substantial influence over the conduct of that license is nonsensical. Indeed, there is a strong argument that, through the cumulation of these factors, Fox will exercise de facto control over that station. In any event, it makes a complete mockery of the attribution rules to say that Fox will not at least be attributed with that interest.

Another example is NBC's 49% interest in WKYC-TV in Cleveland. That interest is not attributable under the Commission's rules, even though NBC also provides 18 hours of programming per day to that station.

These examples demonstrate the potential abuses that the single majority shareholder exemption makes possible. It invites networks and other large broadcasters to structure deals which they will effectively control but which will involve a nominal single majority shareholder in order to extend their nationwide or local reach, without it being counted against the ownership limits. This is reminiscent of the types of abuses which occurred under the Commission's former comparative hearing proceedings in which the Commission repeatedly discounted or refused to credit integration claims made by limited partnership applicants under the nominal control of a female or minority general partner. In those cases, the Commission ruled that the limited partners had sufficient influence or control that they should be considered to be part of the control group for purposes of evaluating the comparative standing of the applicant.

The same type of approach is warranted in the attribution area. Companies or individuals should not be permitted to hide behind an sweeping exemption which simplistically assumes that large minority shareholders have no influence whatsoever over station operations when there is a single majority shareholder. Accordingly, AFLAC submits that this exemption should be eliminated.

B. TELEVISION LMAS AND TIME BROKERAGE AGREEMENTS SHOULD BE DEFINED AS ATTRIBUTABLE INTERESTS.

For many of the same reasons, AFLAC also believes that television LMAs (Local Management or Marketing Agreements) or time brokerage agreements should be attributable. Many LMAs raise serious concerns as to whether one station has not impermissibly ceded *de facto* control to the station providing the programming. But even in instances where the licensee is found to properly have maintained control, there is no question that the programming station has a significant amount of influence over the other station -- even if the role of the brokering station is only to provide programming.

More and more, of course, these agreements are not simply programming arrangements but involve sharing of facilities and personnel, as well as financing. For example, in a recent instance with which AFLAC is familiar, an assignment application proposed the sale of a station to a party who then proposed to immediately enter into an LMA with another station in the market. That station agreed to lend the purchaser the entire purchase price for the station, to pay a substantial salary to the principal of the purchaser for several years and had an option to acquire the station from the purchaser for a specified price. In the interim, of course, the other station would provide virtually all the programming on the station and would sell most of the advertising time.

Plainly, this type of arrangement, and television LMAs generally, should be defined as an attributable interest. The failure to do so would invite the continued abuse of this type of agreement as a gaping loophole in the Commission's local and national ownership limits.